

Appeal No. 2008AP546

**Cir. Ct. No. 2005CV1424
2005CV1519
2005CV2035**

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

TOWN OF CROSS PLAINS,

PLAINTIFF-RESPONDENT,

V.

**KITT'S "FIELD OF DREAMS" KORNER, INC., BOW-WOW
ENTERTAINMENT LLC, KITT J. KALSCHUR, GERALD G.
WOOD, JR., AND RICHARD BICKEL,**

DEFENDANTS-APPELLANTS,

ROBERT D. RELPH,

DEFENDANT.

KITT'S "FIELD OF DREAMS" KORNER, INC.,

PLAINTIFF-APPELLANT,

V.

TOWN OF CROSS PLAINS,

DEFENDANT-RESPONDENT.

KITT'S "FIELD OF DREAMS" KORNER, INC.,

PLAINTIFF-APPELLANT,

V.

TOWN OF CROSS PLAINS,

DEFENDANT-RESPONDENT.

FILED

APR 02, 2009

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Higginbotham, P.J., Vergeront and Lundsten, JJ.

This case requires clarification of the proper legal standards to apply in determining: (1) whether the appellants sufficiently established adult dancing at their tavern before adoption of a county zoning ordinance, such that the adult use became a permitted nonconforming use, and (2) if that nonconforming use was established, whether it was forfeited by an expansion of the facility. Resolution of these legal issues requires the weighing of competing public policy concerns and possibly the development or clarification of existing case law. We therefore certify this appeal to the Wisconsin Supreme Court to clarify these legal standards under WIS. STAT. RULE 809.61 (2007-08).¹

Although this litigation has a complicated history and includes three consolidated circuit court cases, for purposes of this appeal it has been distilled to a relatively simple posture. It concerns claims brought under 42 U.S.C. § 1983 by corporations and individuals associated with a tavern business in the Town of Cross Plains. That business provided adult-oriented dancing for a period of time, operating under the name Hot Rods. These claims for money damages were filed against the Town for actions the Town took against the tavern regarding its liquor license and compliance with a Town zoning ordinance. The circuit court ruled on summary judgment that these claims had no merit because Hot Rods had not been

¹ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

in compliance with a *county* zoning ordinance, and therefore would not have had a right to continue operating, regardless of what the Town did. Thus, the first issue argued on appeal is whether Hot Rods would have been permitted to operate under the Dane County zoning ordinance.

More specifically, the issue is whether Hot Rods' nonconforming use would have been allowed because it was sufficiently established before the effective date of the county ordinance. The county ordinance would have banned the adult use Hot Rods was making of the property. The parties agree that, by statute, county zoning ordinances are not permitted to prohibit continuance of previously lawful uses. *See* WIS. STAT. § 59.69(10)(a). Although the test for a protected nonconforming use is well established, we believe the facts in this case demonstrate that it needs development or clarification. To be protected, the nonconforming use must have been "active and actual" before the ordinance, and not merely "casual and occasional, or ... accessory or incidental to the principal use." *Walworth County v. Hartwell*, 62 Wis. 2d 57, 61, 214 N.W.2d 288 (1974); *see also Waukesha County v. Seitz*, 140 Wis. 2d 111, 115, 409 N.W.2d 403 (Ct. App. 1987). Because the case was decided on summary judgment, the proper standard of review is *de novo*. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

Most of the facts appear to be undisputed. Before becoming Hot Rods the bar operated as a sports bar under a different name. There was a bar area that served as the everyday place to conduct sports-bar activities, and there was also a second room, referred to as a banquet room, that was used for a variety of special purposes. About two weeks before the county's ordinance became effective, a facility with daily live nude dancing was created using the banquet room and tables and folding chairs already on the premises. The facility already

had a stage, a disc jockey, and sound equipment and temporary lighting were brought in. After the ordinance was adopted the adult area was renovated and more permanent fixtures were installed. An operator of the tavern agreed during litigation that they began the operation when they did for the purpose of avoiding the restrictions of the county's new ordinance.

The circuit court held that the new owners "did nothing to create a new principal use of the property." The court held that the adult use was "temporary and merely incidental" to the use as a sports bar. It stated that the owners "did not alter the character of the property or establish a new primary use until after extensive remodeling of the premises."

On appeal, the tavern parties argue that replacing a sports bar with adult dancing was a substantial change of use that was active and actual, even if only in place for approximately two weeks before the effective date of the county's ordinance. The Town, in contrast, argues that this was insufficient because of the short duration of time, the use of temporary equipment, and the lack of monetary investment in establishing the new use.

In our view, the legal standard we described above has not been sufficiently developed. In particular, the standard offers little guidance on what weight, if at all, should be given to factors such as the nature of the physical premises, the duration of the prior use, and financial investment made.

One disputed point, for example, is over the length of time that the use must have existed. The tavern parties' position is that the two weeks of adult use is sufficient, when that use was the primary use made of the space and the business during that period. The Town, in contrast, regards the duration as relatively short, when compared to the long history of the tavern at that location.

It is not clear to us whether the duration for which the use has been active and actual matters or, if it does, how to determine the weight to be given short time periods such as here.

Another question is whether it is important that there be changes in the physical space, as opposed to changes in what people are actually doing in the space. The Town, for example, highlights the temporary nature of the production equipment and the lack of permanent physical modifications to create a more-typical adult performance space. It argues that the physical premises continued to be a sports bar, regardless of what people were actually doing there. The tavern parties focus instead on the activity the space was actually being used for by the managers of the business and the customers who were present.

Similarly, the Town argues that, to create a protected nonconforming use, the user must have made significant financial investment, rising to the level that the user would be entitled to a “takings” compensation if the use is terminated by the ordinance. This argument appears to overlap to some degree with the Town’s argument regarding changes in the physical space. The tavern parties, on the other hand, argue that investment can establish the right to a nonconforming use before the use has actually begun, but is not a necessary element when the use has already started, as here.

The Town also argues that Wisconsin should adopt what it refers to as a “good faith” rule that would bar deliberate last-minute attempts to establish a nonconforming use while proposed ordinances are pending. This argument has attractive elements to it as a measure to prevent efforts to beat the regulatory adoption deadline, although we question whether labels like “bad faith” and “good faith” are helpful descriptions of the conduct. If it is permissible to knowingly

establish a use so that it can be grandfathered in, that could be viewed as not bad faith, but simply a wise business move. Instead, it may be more appropriate to focus on the policy reasons for why this motivation should or should not be relevant to the legal test for establishing a nonconforming use.

We note that the record in this case is not well developed on two points that may be important in the analysis. However, we are unable to determine whether these shortcomings in the record would affect the outcome, because we do not know what importance these facts may ultimately have in the legal analysis. First, it is unclear whether the sports bar business continued to operate in its usual place in the building after the adult use began in the banquet room. The parties' briefs contain conflicting assertions about whether the adult use was exclusive or the sports bar use continued. Neither party cites evidence in support of their assertions, and our review of the record suggests that it may be silent on this point. This fact is potentially important because it would go to whether the adult use was incidental to an ongoing sports bar operation in the other room.

Second, the extent of the tavern's financial investments before the ordinance is unclear. The tavern asserts in its reply brief that the town's investment argument is not properly before us on appeal because the town did not make the argument in circuit court. If it had, the tavern asserts, the tavern would have submitted additional summary judgment material to demonstrate its financial investments. Instead, the record is incomplete on this point.

In addition to the matter of whether a nonconforming use was established, this case presents a second issue on appeal. The circuit court held that, if the adult use of the bar was established as a nonconforming use, that use was forfeited by the later expansion of that use. The court's ruling was based on a

county ordinance that bars buildings or premises used as a nonconforming use from being added to or structurally altered so as to increase the facilities for the use. The court held that the creation of various physical features within the existing space was an alteration that increased the facility. These alterations included addition of two balconies, a lounge, private viewing booths, and poles on the stage.

On appeal, the tavern parties argue that this remodeling, without actual physical expansion of the space, was not an increase in the facility by measures such as its patron capacity, square footage, or nature of services offered. The Town agrees with the circuit court. Resolution of this issue would likely hinge on whether significant physical improvements within an otherwise unexpanded space constitute an increase in the facility for the adult nonconforming use.

In summary, both of these zoning issues require the weighing of competing public policy concerns, and possibly the development or clarification of existing case law. These issues are best resolved by the supreme court.

